Petition

81-1925

NO.

Supreme Court, U.S.
FILED
APR 15 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

LARRY BAXTER,

Petitioner,

VS.

STATE OF ARKANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

ART ANDERSON
MART VEHIK
McMATH, LEATHERMAN & VEHIK, P.A.
711 West Third Street
Little Rock, Arkansas 72201

By: ART ANDERSON
(501) 376-3021

Attorneys for Petitioner

TREVATHAN PRINTING COMPANY, NEWPORT, ARKANSAS

QUESTIONS PRESENTED FOR REVIEW

I.

Can a state judicially dispense with the requirement of "reasonable suspicion" under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), by gratuitously characterizing an otherwise "show of force" stop as a mere solicitation of information pursuant to a state statute which authorizes police officers to request information from persons who may be able to assist in the detection or prevention of crime?

II.

A.

(1) Can *New York v. Belton*, —— U.S. ——, 101 S.Ct. 2860 (1981) be extended to authorize the search of containers in the trunk of a hatch-back vehicle?

(2) Can *Belton* be extended to authorize the search of a motor vehicle and its contents when the arrestee is locked up and physically distant from the scene of the search?

B.

Is there an exceptation of privacy in opaque cloth bags hidden in the trunk of a motor vehicle?

C.

Should the law as it relates to Fourth Amendment warrant requirements with respect to searches of automobiles be reexamined in its entirety?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES CITED iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 8

REASONS FOR GRANTING THE WRIT:

I. The decision below has initiated a very insidious and serious erosion of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), which should be carefully examined 12

II. A. This case involves significant issues concerning the search of the contents of a motor vehicle which should now be resolved 22

B. This case involves issues which are presently before this Court in *United States v. Ross*, and certiorari should be granted so these issues can be decided simultaneously 25

C. The law as it relates to Fourth Amendment warrant requirements should be re-examined in its entirety 27

CONCLUSION 28

APPENDIX:

Appendix "A" A-1

Appendix "B" A-8

Appendix "C" A-21

TABLE OF AUTHORITIES

Cases:	Page
Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586 (1979)	26
Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637 (1979)	15, 21
Burkett v. State, 271 Ark. 150, 607 S.W.2d 399 (1980)	26
Carpenter v. Sigler, 419 F.2d 169 (8th Cir. 1969)	14
Chambers v. Maroney, 399 U.S. 42, 419, 90 S.Ct. 1975 (1970)	26, 27
Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969)	24, 25
Moore v. State, 268 Ark. 171, 594 S.W.2d 245 (1980)	26
New York v. Belton, —— U.S. ——, 101 S.Ct. 2860 (1981)	22, 23, 24, 25, 26, 27
Robbins v. California, —— U.S. ——, 101 S.Ct. 2841 (1981)	26, 27
Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)	i, 12, 13, 15, 16, 18, 19, 20, 21, 22
Tillman v. State, 271 Ark. 552, 609 S.W.2d 340 (1980)	26
United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971)	13

Page

United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981) 25, 27

United States v. Ward, 488 F.2d 162 (9th Cir. 1973) 13

Constitutional provision:

U.S. Const., Fourth Amendment 2

Statutes:

Ark. Stat. Ann. §43-429 ..... 2, 14

Ark. Stat. Ann. §43-432 ..... 3, 14

Ark. Stat. Ann. §43-433 ..... 3, 19

Ark. Stat. Ann. §43-434 ..... 4, 19, 20

Ark. Stat. Ann. §43-435 4

Ark. Rules Crim. Proc., Rule 2.2 ..... 6, 16

Ark. Rules Crim. Proc., Rule 3.1 ..... 6, 14

Ark. Rules Crim. Proc., Rule 3.5 ..... 7, 14

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

LARRY BAXTER,

Petitioner,

VS.

STATE OF ARKANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at 274 Ark. 539 (1977) and is attached as Appendix "B". The unpublished opinion of the Arkansas Court of Appeals, delivered on September 9, 1981, is attached as Appendix "A". The denial of the Petition for Rehearing, issued February 16, 1982, is attached as Appendix "C".

JURISDICTION

The opinion of the Arkansas Supreme Court was filed on January 18, 1982. The Petition for Rehearing was denied by that Court and judgment entered on February 16, 1982. This Petition for a Writ of Certiorari was filed within sixty (60) days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Fourth Amendment:

> [Unreasonable searches and seizures.] — The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Ark. Stat. Ann. §43-429:

> 43-429. *Stopping and detaining person reasonably suspected of committing or about to commit a felony — Time limit.* — (a) law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person whom he reasonably suspects is committing, has committed, or is about to commit a felony, if such action is reasonably necessary to identify or determine the lawfulness of such person's conduct. An officer acting under this section may require that person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes, at the end of such period the person detained shall be released without further restraint, or arrested and charged with a crime.
>
> (b) As promptly as is reasonable under the circumstances, a law enforcement officer who has detained a person under this section shall advise that person of his official identity and inform such person of the reason for the detention. [Acts 1969, No. 378, §1, p. 1086.]

Ark. Stat. Ann. §43-432:

> 43-432. *Material witness to felony.* — Whenever a law enforcement officer has reasonable cause to believe that any person found at or near the scene of a felony is a material witness to the felony, he may stop that person and after having identified himself he must advise the person of the purpose of the stopping and may then demand of him his name, address, and any information he may have regarding the felony. Said detention shall in all cases be reasonable and in no event shall such detention be in excess of fifteen (15) minutes. [Acts 1969, No. 378, §4, p. 1086.]

Ark. Stat. Ann. §43-433:

> 43-433. *Definitions.* — For the purposes of this Act [§§43-429 — 43-436]:
>
> (1) The terms "law enforcement officer" and "officer" mean any law enforcement officer authorized to arrest individuals for the commission of a felony.
>
> (2) The term "reasonably suspects" means that degree of certainty less than the probable cause necessary to justify a lawful arrest but more than a mere suspicion, which a reasonably prudent law enforcement officer would have under all circumstances before he interferes with a person's liberty in the conscientious performance of his duties to prevent, detect, and investigate crime and preserve law and order in the community. [Acts 1969, No. 378, §5, p. 1086.]

Ark. Stat. Ann. §43-434:

43-434. *Limitations on right to stop and search.*— This Act [§§43-429 — 43-436] shall not be construed to:

(1) Permit an officer to stop just any passer-by and search him, nor allow the search of any person merely because he has a criminal record.

(2) Permit the stopping and searching of any person found in the vicinity of a felony scene, merely because he happens to be there.

(3) Dispense with the need for adequate observation and investigation, depending upon all the circumstances, before a stop is made.

(4) Permit an officer to stop anyone, under this Act, unless he is prepared to explain with particularity his reasons for stopping such person.

(5) Permit any officer to stop anyone, under this Act, unless the crime he reasonably suspects is a felony.

(6) Permit everyone stopped to be searched; searches are only permitted when the officer reasonably suspects he is in danger.

(7) Impair any existing law permitting an officer to make an arrest without an arrest warrant, or a search incident to such [arrest]. [Acts 1969, No. 378, § 6, p. 1086.]

Ark. Stat. Ann. §43-435:

43-435. *Stop and search distinct from right to arrest — Grounds to reasonably suspect.* — (a) The

right to stop provided in the new law [§§43-429 — 43-436] in no way changes the previously existing authority of an officer to make an arrest without an arrest warrant. The new rights to stop and to search, as defined in the new law, are separate and distinct from the established right to arrest, as provided by existing law, and to make a complete search incident to such arrest.

(b) The following are among the factors to be considered in determining if the officer has grounds to "reasonably suspect":

1. The demeanor of the suspect.

2. The gait and manner of the suspect.

3. Any knowledge the officer may have of the suspect's background or character.

4. Whether the suspect is carrying anything, and what he is carrying.

5. The manner in which the suspect is dressed, including bulges in clothing — when considered in light of all of the other factors.

6. The time of the day or night the suspect is observed.

7. Any overheard conversation of the suspect.

8. The particular streets and areas involved.

9. Any information received from third persons, whether they are known or unknown.

10. Whether the suspect is consorting with others whose conduct is "reasonably suspect."

11. The suspect's proximity to known criminal conduct.

12. Incidence of crime in the immediate neighborhood.

13. The suspect's apparent effort to conceal an article.

14. Apparent effort of the suspect to avoid identification or confrontation by the police. [Acts 1969, No. 378, §7, p. 1086.]

RULE 2.2. *Authority to Request Cooperation.*

(a) A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

(b) In making a request pursuant to this rule, no law enforcement officer shall indicate that a person is legally obligated to furnish information or to otherwise cooperate if no such legal obligation exists. Compliance with the request for information or other cooperation hereunder shall not be regarded as involuntary or coerced solely on the ground that such a request was made by a law enforcement officer.

RULE 3.1 *Stopping and Detention of Person: Time Limit.*

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of

forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

RULE 3.5 *Stop of Witness to Crime.*

Whenever a law enforcement officer has reasonable cause to believe that any person found at or near the scene of a felony is a witness to the offense, he may stop that person. After having identified himself, the officer must advise the person of the purpose of the stopping and may then demand of him his name, address, and any information he may have regarding the offense. Such detention shall in all cases be reasonable and shall not exceed fifteen (15) minutes unless the person shall refuse to give such information, in which case the person, if detained further, shall immediately be brought before any judicial officer or prosecuting attorney to be examined with reference to his name, address, or the information he may have regarding the offense.

STATEMENT OF THE CASE

On March 27, 1980, a wet rainy day, M & M Jewelers was robbed by two men who escaped through the rear door. No get-away car was seen. Later that afternoon the store clerk gave a written statement to the Little Rock police in which she fixed the time of the robbery at 3:15 p.m.

At 4:05 p.m. Officer Porterfield, who was several miles away, heard a broadcast of the robbery over his police car radio. The information given in the broadcast was that there were two white males involved wearing army jackets, that one had on black boots and the other tennis shoes, and that both were approximately six feet tall. Officer Porterfield immediately proceeded to Kanis Park because he had a hunch he would find the robbers there. Upon arriving in the park, he observed an orange Vega and did not see anyone else in it besides the driver. In his testimony, Officer Porterfield admitted that the driver was not doing anything unlawful or even unusual and that he didn't fit the description of the robbers; nonetheless, he flipped on his flashing blue lights, gave chase and pulled the car over.

The driver got out, walked back to the police car (which was parked fifteen feet behind the Vega) and produced his license upon demand. Officer Porterfield noticed that he had on tennis shoes, that his pants legs were a "little bit wet," and that his hand shook as he took his license out. From that, Officer Porterfield decided to inspect the Vega; whereupon the driver informed him that two other men were in the car. Officer Porterfield drew his gun and ordered the other two to come out. One had on black boots, the other tennis shoes. Neither was wearing an army jacket

or a beard. Officer Porterfield secured the three men in the back compartment of the squad car, placed them under arrest, kept them under cover, and radioed for assistance.

Several other police units then arrived. The three men were placed in separate police cars, and the Vega was searched, including its "hatch-back" compartment. Officers Frederick and Hodo, who performed the search, testified at the suppression hearing that they saw through the Vega's windows an army jacket and a plastic floral wreath with two "pillowcase-type bags" under it in the back of the car and a pair of army boots and some kind of wig on the front floorboard. However, the other officers independently testified that the boots were still on one of the suspects. This was also confirmed by the property officer who testified that they were only one pair of boots which were taken from one of the suspects. It was finally admitted that there were no boots in the car.

Yet, Officers Frederick and Hodo claim to have seen and touched the boots on the front floorboard; and, within a few moments, they entered the car and seized the army jacket, the non-existing boots and the wig. They also grabbed the wreath and the bags beneath it. After having removed the bags from the car, they opened them and found that they contained jewelry and two handguns. All this was accomplished while the three suspects were under arrest and already fully secured by the other officers. After the vehicle was searched, it was impounded under the direction of the police department.

The three suspects were each tried separately. The Petitioner was tried first on September 8, 1980. According to his testimony, he was a close friend of the other two

Defendants. On the day in question, he was at home preparing some assignments for one of his college classes when, sometime shortly after 3:00 p.m., he received a phone call from one of the other Defendants asking him to meet both of them at Kanis Park, which is a large wooded and hilly park on the west side of Little Rock. He said that he would, and then went back to complete his homework. At about 3:30 p.m., his mother called home to remind him to fix the flat in the spare tire on her car.

He decided to meet his friends and fix the tire on the same trip, so he drove his mother's car, an orange Vega, to Kanis Park where he got out for awhile and walked around the pavilion area looking for his friends. After not seeing them, he got back in the car and waited. Shortly thereafter they appeared and got in the car with some sacks; according to his testimony, he did not yet know what was going on. When they approached Officer Porterfield's patrol car, his two friends ducked out of view. The Petitioner then became suspicious because he sensed that his friends may have done something wrong.

The jury apparently reluctantly convicted the Petitioner. They brought back the lowest possible sentence and recommended to the Court that he be given leniency. The Petitioner was thereafter sentenced to five years imprisonment in the Arkansas Department of Corrections for aggravated robbery and three years imprisonment in Arkansas Department of Corrections for theft of property with both sentences to run concurrently. He was sentenced under the Youthful Offender's Act so that his record could be expunged.

His case was appealed to the six-man Arkansas Court of Appeals which, on September 9, 1981, arrived at a 3-to-3 decision, thereby affirming the conviction. The Arkansas Supreme Court thereupon accepted the case for review and, on January 18, 1982, affirmed the conviction, with a strong dissent being registered by Justice Purtle. A Petition for Rehearing was denied on February 16, 1982. The opinions of these two Courts and the denial of the Petition for Rehearing are included herein as Appendix "A", "B" and "C'. It is from the affirmance of the conviction by the Arkansas Supreme Court that this Petition is brought within the requisite 60-day time period from the date of the denial of the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW HAS INITIATED A VERY INSIDIOUS AND SERIOUS EROSION OF *TERRY v. OHIO*, 392 U.S. 1, 88 S.Ct. 1868 (1968), WHICH SHOULD BE CAREFULLY EXAMINED.

The robbery of the M & M Jewelry Store occurred at about 3:15 p.m., according to a statement given to the police shortly afterwards by Carolyn Sue Teeter, a store clerk. [At the time of trial, however, the prosecutor revised this estimate through a leading question to the witness in which he suggested "a little before four o'clock" as the time of the robbery.] The Petitioner testified that he received a phone call "a little bit after three" from one of the other two Defendants, both of whom were friends of his, in which he was asked to pick them up at Kanis Park. He agreed but, instead of leaving immediately, stayed home to finish an accounting problem on which he was working as part of a homework assignment for school.

At 3:30 p.m., the Petitioner's mother called home from work to remind him to have her spare tire fixed. This was testified to by the Petitioner and by his mother. Shortly after this call, the Petitioner left for Kanis Park to pick up his friends and to have the flat fixed. On the way out of the house, he noticed it was about 3:40 p.m. The Petitioner drove his mother's car to the park, got out, and walked around the pavillion area looking for his friends. Not seeing them anywhere, he went back into the car and waited a few minutes for them.

Officer Porterfield testified that at 4:05 p.m., he received a radio broadcast on the robbery which included a

description of the suspects. The description mentioned the army jacket, the black boots, the tennis shoes, and that both men were approximately six feet tall. The broadcast, however, made no mention of a car. Officer Porterfield went immediately to Kanis Park because he had a hunch that the robbers might be there.

In the meantime, the Petitioner's friends arrived and got into the car; and the Petitioner then began to drive out of the park. He came to the intersection of two park roads where he noticed Officer Porterfield's police car. But, instead of turning in an opposite direction to avoid Officer Porterfield, he continued on his way out of the park by turning onto the road where Officer Porterfield's car was and driving directly past it. These events were testified to both by the Petitioner and by Officer Porterfield.

The Petitioner testified that at this point he did not yet know about the robbery or that anything was wrong. Officer Porterfield testified that the Petitioner and he looked at each other as they passed, that the Petitioner was not breaking any laws or doing anything else unusual, and that the Petitioner did not fit the description of the robbers. Nonetheless, Officer Porterfield flipped on his flashing blue lights, gave chase and pulled the Vega over.

This Court has unequivocally held in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), that, when an officer accosts an individual and by a show of authority restrains his liberty short of arrest, the stop becomes a "seizure" of the person. This proposition has consistently been applied to the stopping of an individual in a car as well as on foot. *United States v. Ward*, 488 F.2d 162 (9th Cir. 1973); *United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971). And, it has specifically been applied to the pulling to the curb of an

individual in a car by way of the flashing lights of a pursuing police vehicle. *Carpenter v. Sigler,* 419 F.2d 169 (8th Cir. 1969).

The State of Arkansas has attempted to implement *Terry* through statutory enactment and judicially promulgated Rules of Criminal Procedure. Ark. Stat. Ann. §43-429(a) (Repl. 1977) and Arkansas Rules of Criminal Procedure, Rule 3.1 are almost identical in language and, in pertinent part, state:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person whom he *reasonably suspects* is committing, has committed or is about to commit a felony *if such action is reasonably necessary to identify or determine the lawfulness of such person's conduct.* (Emphasis added)

Rule 3.5 of the Arkansas Rules of Criminal Procedure in pertinent part, states:

> Whenever a law enforcement officer has *reasonable cause* to believe that any person found at or near the scene of a felony is a witness to the offense, he may stop that person. After having identified himself, the officer must advise the person of the purpose of the stopping and may then demand of him his name, address, and any information he may have regarding the offense. (Emphasis added)

Ark. Stat. Ann. §43-432 (Repl. 1977) is almost identical to Rule 3.5, except that it specifically requires that there be reasonable cause to believe that the person to be stopped is a "*material* witness to a felony." (Emphasis added)

Thus it is clear that under Arkansas' own implementation of *Terry*, a police officer either must have a reasonable suspicion that the person to be stopped is committing, has committed or is about to commit a felony, or he must have reasonable cause to believe that the person is a witness to a felony. In fact, Officer Porterfield further testified that he stopped the car to ask the Petitioner if he had seen anyone in the park. In other words, Officer Porterfield, according to his own account of the events, stopped the Petitioner because he thought he might be a possible witness, if not to the crime itself, at least to the getaway.

This Court has also held in *Brown v. Texas*, 443 U.S. 47 at 51, 99 S.Ct. 2637 (1979), that the "reasonable suspicion" must be *"based on objective facts."* (Emphasis added) The Arkansas Supreme Court, however, recognized the obvious dilemma this would create since there were no "objective facts" giving rise to a "reasonable suspicion" or "reasonable cause" sufficient to warrant the stopping of Petitioner as a suspect or as a witness. The Arkansas Supreme Court thereupon attempted to obviate this dilemma by gratuitously characterizing the stop as a merely innocuous information gathering exercise. The Arkansas Supreme Court stated:

> Involved here is the question of the extent of permissible interruption a citizen must bear to accommodate a law enforcement officer who is investigating a crime. The practical necessities of law enforcement and the obvious fact that any person in society may approach any other person for purposes of requesting information make it clear the police have the autnority to approach civilians.

The Arkansas Supreme Court then went on to legitimize the stop by applying Rule 2.2 of the Arkansas Rules of Criminal Procedure. Rule 2.2, in pertinent part, states:

> A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

The Arkansas Supreme Court thereafter characterized the intrusion in this case as "minimal." Said the Court: "The manner and intensity of the interference was slight and significantly casual." The Court was obviously being euphemistic with its characterization of the facts in order to more convincingly legitimize the stop through an application of Rule 2.2. But the reality of the situation is that the Petitioner was stopped by way of a flashing blue light chase. This is a "show of force" — not a "slight and significantly casual" — interference.

Specifically, the question here becomes whether such a "seizure," pursuant to Rule 2.2 of the Arkansas Rules of Criminal Procedure, is "reasonable" under the Fourth Amendment; and *Terry* establishes a twofold test for judicial inquiry into this question of "reasonableness." First, was the officer's action justified at its inception? And, second, was it reasonably related to the circumstances which justified the interference in the first place?

Obviously, if the officer's action was not justified at its inception, there is no need to proceed to the second prong of this test. And, the inquiry into whether the officer's action was justified must be determined from the "objec-

tive facts" then presented to him. A review of these facts, however, clearly indicates that a stop was not warranted under *Terry* and that it was, therefore, violative of Petitioner's Fourth Amendment guarantees.

Fact 1: Officer Porterfield sees a bright orange Vega. This car should not have prompted any suspicion for two reasons. First, no car was seen or mentioned with respect to the robbery; instead the robbers were said to have absconded by foot through a rear door which did not lead to any ready getaway route for a vehicle. (A diagram was introduced into evidence of the area immediately surrounding the scene of the robbery which demonstrated that if the robbers had a car in the rear, they would have had to drive it back around to the front in order to escape.) Second, even if it is reasonable to assume that the robbers would have subsequently met up with an escape vehicle, a bright orange Vega is not a likely, low-profile getaway car that they would be expected to be in.

Fact 2: The driver of the Vega approaches an intersection and turns in the direction of Officer Porterfield's squad car which is fully visible to him. This also negates suspicion. There were other ways to exit from the park. The Petitioner could have driven straight or turned in the other direction, thereby avoiding the police car. Had he done so, *that* perhaps would have been grounds for suspicion. But he did not.

Fact 3: The Petitioner looks directly at Officer Porterfield as he passes him. Again, this is not consistent with suspicious conduct; and, Officer Porterfield did not indicate that this conduct on the part of the Petitioner in any way aroused his suspicion. If anything it, too, should have negated suspicion.

Fact 4: The Petitioner did not fit the description given of the robbers. When he got out of the car, this was obvious. But, even while he was still in the car, Officer Porterfield testified on cross-examination that he did not observe anything about the Petitioner's appearance that linked him to the description he had received over the radio. Again, this negates suspicion.

Fact 5: The Petitioner was not driving improperly or doing anything wrong or illegal. Indeed, Officer Porterfield specifically admitted on cross-examination that he did not even notice anything unusual about the car. He was asked this in response to his assertion on direct examination that the Petitioner was "leaving at a pretty good pace" but "not an extremely high speed or anything." In other words, the Petitioner was driving within the speed limit — albeit, at "a pretty good pace" — and continued to do so even after he saw the police car. Again, this conduct does not evoke suspicion; on the other hand, had Petitioner slowed down upon seeing the police car, there may have then been grounds for suspicion.

There simply were no "objective facts" to justify the stop in accordance with the requirements of *Terry*. All that Officer Porterfield had the benefit of was his own subjective "hunch" that the robbers might be in the Kanis Park area. Of course, after what might have been a good fifty minutes after the robbery (depending on what statement regarding the time of its commission is used), the robbers could just as well have been anywhere in Little Rock or beyond.

Perhaps the most discrediting aspect of Officer Porterfield's action was that it specifically violated the unequivo-

cal prohibition of Ark. Stat. Ann. §43-434(1) and (2) which state:

> This Act [Arkansas Stop and Search Act, §§43-429 — 43-436] shall not be construed to:
>
> (1) Permit an officer to stop just any passer-by . . .
>
> (2) Permit the stopping and searching of any person found in the vicinity of a felony scene, merely because he happens to be there.

On the basis of all objective facts then available, the Petitioner was "just any passer-by" who was stopped simply because he was "found in the vicinity of a felony scene, merely because he happened to be there." This is in violation of Arkansas' own interpretation and implementation of the *Terry* requirements.

Ark. Stat. Ann. §43-433(2) carefully defines the term "reasonably suspects" in a way that renders Officer Porterfield's actions, which were based solely on his subjective hunch, clearly improper. Section 43-433(2) states:

> The term "reasonably suspects" means that degree of certainty less than the probable cause necessary to justify a lawful arrest but more than a mere suspicion, which a reasonably prudent law enforcement officer would have under all circumstances before he interferes with a person's liberty in the conscientious performance of his duties to prevent, detect, and investigate crime and preserve law and order in the community.

In light of these statutory provisions, it is simply makeweight and begging-the-question for the Arkansas Supreme Court to characterize this stop as a simple information

check in order to avoid the repercussions of *Terry*. To the contrary, the flashing blue-light chase constituted a classic "seizure" under *Terry*.

The conspicuous absence of "reasonable suspicion" is probably why Officer Porterfield, by the time he was called upon to testify at trial, also attempted to characterize his action as simply stopping the Petitioner to seek information. But this retroactive explanation of his action is inconsistent with the factual events. Officer Porterfield swung a U-turn after the bright orange Vega passed, put on his flashing blue lights, and chased the car down. He then demanded the occupant's driver's license; implicit in this is an accusation of guilt. This was not an innocent or innocuous information check; this was a full-scale round-up.

Officer Porterfield could have waived or otherwise signaled for the Vega to stop as its driver passed him on the road, especially since they were looking at each other at the time. Or, he could have taken down the license plate number, proceeded on with his investigation and checked back with the Petitioner later, if necessary. Or, Officer Porterfield could have continued following the Vega in order to further and more adequately observe its occupants, as he is required to do under Arkansas Statute Annotated §43-434(3), before stopping him.

Officer Porterfield did not use these less intrusive means which were readily available to him but, instead, mounted a full-scale chase. This apparently is why, in his testimony, he at first tried to project at least a faint aura of "suspiciousness" when he said that the Petitioner "was leaving at a pretty good pace." There was no other way from the facts for him to justify a blue-light chase-down.

And, this "leaving at a pretty good pace" rationalization was also quickly dissolved away on cross-examination when Officer Porterfield admitted that he observed no laws — speeding or otherwise — being broken by the driver of the Vega.

What happened is only too clear. Officer Porterfield went to the park, saw a car and had a mere "hunch" — the very thing that *Terry* and *Brown* prohibit as a basis for an invasion into the liberty, security and privacy of an individual. Consider the anatomy of Officer Porterfield's "hunch." He is riding down a main Little Rock street several miles from and in the opposite direction of Kanis Park when he hears a brief radio broadcast concerning a robbery. He very smartly gets the idea that the robbers may have exited through Kanis Park. He reverses his direction, drives to the park and barely gets in when he sees a car. He does not see any other car; but, according to his own testimony, he did not look for other cars, either. He has this idea that the robbers might have exited through Kanis Park, and now he has a car, too. He does not see anything at all suspicious about the car or the driver who does not even fit the description of the robbers received over the radio. But, the mere presence of a car, any car, fits his idea that the robbers might be trying to exit through the park. So, he impulsively swings his squad car around, flips on his blue-lights and chases down the car. Why? Simply because he has this idea that the robbers might have cut through the park. That is the only reason. A "hunch." And hunches are specifically condemned by *Terry* as the basis for a stop.

As noted earlier in greater detail, there was nothing in the objective facts of this situation which would support

any "reasonable suspicion" or "reasonable cause" for a stop. All this was a result of a mere, unsubstantiated "hunch," and therefore constituted a reckless, blatant abuse of the Petitioner's Fourth Amendment rights, even notwithstanding the fact that the hunch was fruitful. It is only too clear from the "objective facts" that Officer Porterfield went to Kanis Park intent on catching the robbers and not to solicit information. The law is well settled that the correctness of a lucky hunch cannot make up for the absence of reasonable suspicion.

The question therefore presented here is whether the State of Arkansas can constitutionally do away with the "reasonable suspicion" requirement of *Terry* and justify the above-described stop of the Petitioner simply by characterizing it as a mere solicitation of information and thereafter invoking and applying a rule of criminal procedure which allows, in very general terms, a police officer to request information. It is submitted that to permit this would constitute a very insidious and serious erosion of *Terry v. Ohio, supra,* and that certiorari should therefore be granted to more fully review this practice which has been initiated by the Arkansas Supreme Court in this case.

II.

A. THIS CASE INVOLVES SIGNIFICANT ISSUES CONCERNING THE SEARCH OF THE CONTENTS OF A MOTOR VEHICLE WHICH NOW SHOULD BE RESOLVED.

The Arkansas Supreme Court upheld the warrantless search of Appellant's car and two containers locked in the hatch-back trunk of the car under the authority of *New*

York v. Belton, 101 S.Ct. 2860 (1981). However, the "bright line" the Court drew in *New York v. Belton*, supra, does not reach the factual situation presented in this search. Certiorari should be granted to determine whether the rationale of *Belton* can be extended to authorize the search of the trunk and containers located in the trunk of a hatch-back vehicle under circumstances when the accused is locked up and physically away from the scene of the search.

The facts of the search of Appellant's car are not controverted and are worthy of review. Shortly after being stopped, Appellant and his two passengers were arrested and locked up under guard in the backs of separate police cars. After the arrest, additional police cars and men arrived at the scene. One of the policemen obtained the car keys, unlocked the trunk and removed two cloth bags from underneath a large floral wreath. He then opened the bags and discovered the contraband.

This search represents the classic situation of the absence of "exigent circumstances" since both Appellant and his car were in exclusive police custody at the time of the search. It is certainly true that after Appellant had been locked up at a point away from the scene of the search, neither his car nor its contents were in any rational sense within the area of his "immediate control." Likewise, once the car and its keys had been reduced to exclusive police custody, the car plainly was not moveable, and whatever evidence it might have contained was no longer subject to destruction. Finally, since the police had already begun the process of transporting Appellant to the police station and impounding his car, no necessity whatever remained to require the search at the scene of the arrest.

From these facts it is obvious this search involved issues which were neither present nor decided in *New York v. Belton*. The vehicle involved is a hatch-back. Its trunk is structurally not a part of the "passenger compartment" and is inaccessible in a practical sense to the occupants or those standing by the vehicle. In this regard it should be noted that before searching the trunk, the police found it necessary to obtain and open the trunk with Appellant's keys. And, unlike in *Belton* where the accused was still standing near the car, the Appellant was locked up in the back of a police car, making his ability to "reach" his automobile a true impossibility.

In *Belton*, this Court expressly stated its decision in no way altered the "fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests". Under *Chimel v. California*, 395 U.S. 750, 89 S.Ct. 2034 (1969), a warrantless search is limited to the area "into which an arrestee might reach in order to grab a weapon or evidentiary item." In *Belton*, this Court described that area to be the "passenger compartment." But, what if the area searched was outside the passenger compartment? What if the accused was no longer present at the scene of the search or was otherwise physically unable to reach the automobile? As Justice Brennan pointed out in his dissent, these questions were not answered by the decision in *Belton*. Justice Brennan asked:

> "Would a warrantless search incident to arrest be valid if conducted five minutes after the suspect left his car? Thirty minutes? Three hours? Does it matter whether the suspect is standing in close proximity to the car when the search is conducted? Does it matter whether the police formed probable

> cause to arrest before or after the suspect left his car? . . . Are special rules necessary for station-wagons and hatch-backs, where the luggage compartment may be reached through the interior . . .?"

As an extension of *Chimel*, the decision in *Belton* should not be construed to mechanistically authorize a search of areas which the arrestee cannot reach, either because he is no longer present or because the area is physically inaccessible. To conclude otherwise would render *Chimel* substantially meaningless, something which this Court obviously did not intend to do.

In *Belton* this Court specifically sought to draw a "bright line" defining permissible conduct. Yet, this line is incomplete. Each of the questions Justice Brennan asked in the foregoing quote from his dissent are present in the warrantless search of Appellant's car. This Court should grant certiorari and decide whether *Belton* authorizes the warrantless search of the trunk of a hatch-back car and its contents under circumstances when the car is no longer within the reach or control of the arrestee.

B. THIS CASE INVOLVES ISSUES WHICH ARE PRESENTLY BEFORE THIS COURT IN *UNITED STATES v. ROSS* AND CERTIORARI SHOULD BE GRANTED SO THESE ISSUES CAN BE DECIDED SIMULTANEOUSLY.

The issue whether there was independent probable cause to conduct a search of Appellant's automobile was not addressed in the state court proceedings. Rather, the search was generally justified as "contemporaneous with a lawful arrest", and ultimately, as discussed, *supra*, upheld under *New York v. Belton*. It is assumed the reason why

independent probable cause to search was not addressed in the state proceedings was because unlike the apparent result under *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975 (1970), Arkansas law requires that there be *both* independent probable cause to search *and* exigent circumstances and holds that once the automobile has been reduced to exclusive police custody, all "exigencies" cease to exist. *Burkett v. State*, 271 Ark. 150, 607 S.W.2d 397 (1980); *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980); *Moore v. State*, 268 Ark. 171, 594 S.W.2d 245 (1980).

If there is no independent probable cause to search, the automobile exception is inapplicable and a warrantless search unlawful. However, probable cause to search the automobile itself does not extend to closed containers in the automobile and presently a search warrant would be necessary to search all such containers located outside the "passenger compartment". *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586 (1979); *Robbins v. California*, —— U.S. ——, 101 S.Ct. 2841 (1981); *New York v. Belton, supra.*

Assuming this Court finds *Belton* inapplicable to the instant case, this Court would still be faced with the question whether there was probable cause to search the trunk and further whether the cloth sacks in the trunk were independently protected from warrantless search and seizure. With respect to the latter, the nature of the sacks in question, the fact that the police needed to open the sacks to determine their contents, and, in particular, the manner in which the sacks were secreted in the back of the trunk underneath the floral wreath clearly suggest an expectation that the contents of the sacks would be free from public examination. However, the question whether there is an expectation of privacy in this general type of

container is presently before this Court in *United States v. Ross*, 655 F.2d 1159 (D.C. Cir. 1981), and it is submitted that certiorari should be granted so that this question can be simultaneously decided.

C. THE LAW AS IT RELATES TO FOURTH AMENDMENT WARRANT REQUIREMENTS SHOULD BE RE-EXAMINED IN ITS ENTIRETY.

As Justice Powell noted, the law concerning searches and seizures is "intolerably confusing", *Robbins v. California, supra*. Despite efforts by this Court to set forth clear and consistent guidelines and the efforts of state and lower Courts to adopt and implement these guidelines, the result has been bewildering.

Unless this Court is ready to abrogate the warrant requirement as it relates to automobiles and the contents of automobiles, this Court should comprehensively re-examine the basic premises of the exceptions justifying searches of automobiles, the validity of those premises, the fictions that the exceptions have spawned, and the rationality of the application of those fictions to the varying factual contexts of automobile searches.

In granting certiorari in *United States v. Ross*, this Court agreed to reconsider *Robbins v. California*. This Court should also reconsider *Chambers v. Maroney, supra*, and other cases, including *New York v. Belton*, responsible for the present confusion. Certiorari should be granted to review the warrant requirements of the Fourth Amendment as these requirements relate to automobiles.

CONCLUSION

For the above-stated reasons, the Petitioner respectfully submits that the Writ of Certiorari should be granted.

Respectfully submitted,

ART ANDERSON
MART VEHIK
McMATH, LEATHERMAN & VEHIK, P.A.
711 West Third Street
Little Rock, Arkansas 72201

By: ART ANDERSON
(501) 376-3021

Attorneys for Petitioner

Appendix

Appendix

APPENDIX "A"

ARKANSAS COURT OF APPEALS

No. CA CR 81-34

LARRY D. BAXTER ..... *Appellant*

v.

STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM PULASKI CIRCUIT COURT
FIRST DIVISION

HONORABLE FLOYD J. LOFTON, *Judge*

AFFIRMED

Opinion Delivered September 9, 1981

LAWSON CLONINGER, *Judge*

Appellant was sentenced to five years in prison for aggravated robbery and three years for theft of property, the sentences to run concurrently. Appellant contends that the trial court was in error when it ruled that the stop, arrest and subsequent search of appellant's car and seizure of objects in the car were lawful. We find no error and we affirm.

Shortly before 4:00 p.m. on March 27, 1980, M & M Jewelers on Barrow Road, Little Rock, was robbed by two men with pistols. Jewelry cases were broken and jewelry items were placed in two sacks. The clerks were made to lie face down on the floor and they were sprayed with mace.

At 4:05 p.m. Officer Porterfield of the Little Rock Police heard the police broadcast of the robbery. One of the robbers was reported to be carrying a Colt .45 automatic and wearing a rubber Halloween mask, green army fatigues, blue jeans and army boots; the other subject was reported to possess a .357 Magnum, and was wearing a rubber Halloween mask, green army fatigues, blue jeans and tennis shoes. Both men were described as white males about six feet tall.

Officer Porterfield immediately went to check out Kanis Park, which is less than one-fourth mile from M & M Jewelers. The area between the store and Kanis Park is a wooded and grassy area, and intermittent rain had been falling. There were no leaves on the trees and the officer could see the entire park area. The officer met appellant's car, eastbound in the park away from the direction of M & M Jewelers. There was no other person or vehicle observed in the park. The officer turned his vehicle around, followed appellant's car, and stopped it at 4:10 p.m. When the officer stopped fifteen feet behind appellant's car, appellant came back to the police car and identified himself. Appellant was not quite six feet tall, and was wearing jeans and tennis shoes, which were both wet. The officer told appellant that there had just been a robbery in the area and asked if he had seen anybody in the park. Appellant said he had seen no one. Because of appellant's wet jeans and muddy tennis shoes, and because of his shaking hands, the officer told appellant that he was going to look in his car, at which time appellant told the officer that he had two friends in his car.

Upon looking in the car, the officer found two men matching the description of the reported robbers lying

down in the floor of appellant's car. One of the men had on muddy black boots and wet jeans, and the other had on muddy tennis shoes and wet pants. The two men and appellant were told that they were under arrest, placed in the back of the police car, and two other officers who had arrived looked into appellant's car. Standing on the outside of appellant's car the officers could see a green army-type jacket, two sacks similar to pillowcases filled with something, and a wig inside the car. The items were removed from appellant's car, and upon examination it was found that the sacks contained 192 different items of jewelry, a .357 Magnum and a .45 automatic. The three suspects were charged jointly, but each was tried separately. Appellant was tried first. Appellant's only point for reversal is that the stop, arrest, and the subsequent search and seizure were illegal.

The actions of the officers developed in a logical sequence, each step justified as the information of the officers increased.

The stop was justified under Rule 2.2, Ark. Rules of Criminal Procedure, which provides:

> RULE 2.2. Authority to Request Cooperation.
>
> (a) A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

Appellee does not contend that before the officer stopped appellant's car there was probable cause to arrest appellant, or reasonable cause to believe appellant was a

witness to the robbery. Appellee contends only that an extremely serious felony had been committed in the immediate area; that the officer had gone to Kanis Park because he suspected the robbers might go there; that appellant was the only person the officer saw in the park; and that the officer's purpose in stopping appellant was to inquire whether he had seen anyone else in the area. Under these circumstances, it was not necessary for the officer to comply with Rule 3.5, Ark. Rules of Criminal Procedure, which applies only to the stopping of a witness to a crime.

The arrest was the product of a lawful stop, and after the additional circumstance of two men matching the police broadcast description being found hiding in appellant's car, there was probable cause for the arrest of all three suspects. Rule 4.1, Ark. Rules of Criminal Procedure, authorizes an officer to make an arrest without a warrant if he has reasonable cause to believe such person has committed a felony. It is to be remembered that probable cause is only a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man to believe that the accused committed a felony, but not tantamount to the quantum of proof required to support a conviction. *Graves v. State,* 256 Ark. 117, 505 S.W.2d 748 (1974). Determination of probable cause is based upon the factual and practical considerations of everyday life upon which reasonable and prudent men, not legal technicians, act. *Draper v. United States,* 358 U.S. 307 (1964). This practical, non-technical concept has been said to afford the best compromise that has been found for accommodating competing interests, so that law enforcement will not be unduly hampered and law-abiding citizens

not left at the mercy of the whim and caprice of a police officer. *Beck v. Ohio*, 379 U.S. 89 (1964).

No prudent policeman would hesitate to make an arrest without a warrant under the circumstances presented in this case.

The search was lawful because it was made contemporaneously with the lawful arrest. Rule 12.4, Ark. Rules of Criminal Procedure, provides:

> RULE 12.4. Search of vehicles: Permissible Circumstances.
>
> (a) If, at the time of the arrest, the accused is in a vehicle or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest is made, the arresting officer may search the vehicle for such things and seize any things subject to seizure and discovered in the course of the search.
>
> (b) The search of a vehicle pursuant to this rule shall only be made contemporaneously with the arrest or as soon thereafter as is reasonably practicable.

The police broadcast had described all the items seen by the officers from outside appellant's car, with the probable exception of the sacks. The officers recognized that something was in the sacks, but there was no evidence presented to show that the police broadcast had described them.

In *Berry v. State*, 263 Ark. 446, 565 S.W.2d 418 (1978), the Court upheld a search for heroin during a warrantless search of a bank bag and a closed but unlocked briefcase. The Court observed, ". . . persons having contraband drugs in their possession could prevent a search for such drugs in an automobile simply by carrying the articles in a suitcase rather than in a sack or in a box." The Court stated that there was no suggestion that the occupants of the vehicle were on a journey or that the briefcase was closed with any expectation of privacy. In the case of *Sanders v. State*, 262 Ark. 595, 559 S.W.2d 704 (1977), the Court declared inadmissible the contents of a suitcase in the trunk of a taxicab found in a warrantless search, and in *Moore v. State*, 268 Ark. 171, 594 S.W.2d 245 (1980), the suitcase doctrine was extended to include a shaving kit. The Court, with three justices dissenting, stated that the defendant was justified in having a reasonable expectation of privacy in the matter of his personal luggage, including his shaving kit.

In *Koonce v. State*, 269 Ark. 96, 598 S.W.2d 741 (1980), the Court said:

> Since Koonce had neither a property interest nor a possessory one, either in the vehicle in which he was only a backseat passenger or in the weapon seized, he had no legitimate expectation of privacy under the front seat of the vehicle, which would entitle him to invoke the exclusionary rule.

The appellant in the instant case was not entitled to a reasonable expectation of privacy when the sacks were seized and opened. He disclaimed ownership of the sacks and denied even knowing they were in his vehicle. Appellant had no interest in the sacks, and since they were in plain view there was no search of appellant's car for them.

Appellant had no standing to question the seizure and subsequent opening of the sacks.

Appellant does not designate the insufficiency of the evidence as a point for reversal, but he does argue the question in his brief. It is sufficient here to note that on appeal the evidence must be viewed in the light most favorable to the appellee, and if there is any substantial evidence to support the verdict it must be affirmed. *Williams v. State*, 258 Ark. 207, 523 S.W.2d 377 (1975). The jury is the sole judge of the credibility of the witnesses and the weight to be accorded their testimony. *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979). Appellant's evidence was presented to the jury and there was ample evidence to support the verdict.

Judgment affirmed.

GLAZE, CORBIN and COOPER, JJ., dissent.

APPENDIX "B"

SUPREME COURT OF ARKANSAS

No. CR 81-101

LARRY D. BAXTER ..... *Appellant*

v.

STATE OF ARKANSAS ..... *Appellee*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS TO REVIEW ITS AFFIRMANCE OF THE PULASKI CIRCUIT COURT, FIRST DIVISION;

FLOYD J. LOFTON, *Judge*

AFFIRMED

Opinion Delivered January 18, 1982

RICHARD B. ADKISSON, *Chief Justice*

Appellant, Larry D. Baxter, was convicted and sentenced to five years for aggravated robbery and three years for theft of property. The sentences were set to run concurrently. The Court of Appeals, by a three to three vote, affirmed the trial court, holding that the stop, arrest, and subsequent search of appellant's car and seizure of objects in the car were lawful. *Baxter v. State*, Court of Appeals, not designated for publication, (September 9, 1981). On petition for review, we affirmed.

Shortly before 4:00 p.m.[1] on March 27, 1980, two men

---

[1]Carolyn Sue Teeter, who was employed at M & M Jewelers the day of the robbery, testified at trial that she could not remember the exact time of the robbery, but set various times for when the robbery occurred; all times stated were between 3:15 and 3:55 p.m. Tim Trulove, another employee on the day of the robbery, testified that the robbery "was somewhere in the three o'clock hour. I would say between 3:30 and 4:00 p.m."

with pistols entered M & M Jewelers on Barrow Road, Little Rock. Jewelry cases were broken and jewelry items were placed in two sacks. The clerks were made to lie face down on the floor and were sprayed with mace.

The facts in part as set out by Judge Cloninger of the Court of Appeals are:

"At 4:05 p.m. Officer Porterfield of the Little Rock Police heard the police broadcast of the robbery. One of the robbers was reported to be carrying a Colt .45 automatic and wearing a rubber Halloween mask, green army fatigues, blue jeans and army boots; the other subject was reported to possess a .357 Magnum, and was wearing a rubber Halloween mask, green army fatigues, blue jeans and tennis shoes. Both men were described as white males about six feet tall.

"Officer Porterfield immediately went to check out Kanis Park, which is less than one-fourth mile from M & M Jewelers. The area between the store and Kanis Park is a wooded and grassy area, and intermittent rain had been falling. There were no leaves on the trees and the officer could see the entire park area. The officer met appellant's car, eastbound in the park away from the direction of M & M Jewelers."

Only appellant was visible in the car and no other person or vehicle was observed in the park. The officer turned his vehicle around, followed appellant's car, and stopped it at 4:10 p.m. to ask the person if he had seen anybody in the park. The officer stopped 15 feet behind appellant's car. Appellant then came back to the police car and identified himself as Larry Baxter. Appellant was wearing wet jeans and muddy tennis shoes. The officer told

appellant that there had just been a robbery in the area and asked if he had seen anybody in the park. Appellant said he had seen no one. Because of appellant's wet jeans and muddy tennis shoes, the officer asked him for his driver's license. The officer also wanted appellant's identification in case detectives wanted to contact him later as a witness. As appellant was removing his driver's license from his wallet, the officer noticed his hands shaking. The officer then told appellant that he was going to look in his car, at which time appellant told the officer that he had two friends in his car.

The officer found two men matching the description of the reported robbers lying on the seats of the car. One of the men had on muddy black boots and wet jeans, and the other had on muddy tennis shoes and wet pants. The officer arrested the three and placed them in the back of his police car.

Two other officers arrived and observed through the window of appellant's car a green army-type jacket, two pillowcases filled with something, and a wig. The items were removed from the car. Upon examination it was found that the pillowcases contained 192 different items of jewelry, a .357 Magnum, and a .45 automatic.

The crucial issue in this case is whether the initial stop of appellant was valid under state and federal law. If the stop is found to be valid, the logical progression of events which followed resulted in probable cause for the arrest. The subsequent search of appellant's car after the arrest was a search incident to a lawful arrest and valid under the recent case of *New York v. Belton*, —— U.S. ——, 101 S.Ct. 2860 (1981).

Cases regarding the police authority to make investigatory stops based upon reasonable suspicion that a vehicle or a person is involved in criminal activity are inapplicable to the stop at issue here. *See United States v. Cortez,* 449 U.S. 411 (1981) and *Terry v. Ohio,* 392 U.S. 1 (1968). Also inapplicable to this stop are cases in which the police have reasonable cause to believe that the person stopped is a material witness. Rule 3.5, Ark. Rules of Crim. Proc., Ark. Stat. Ann., Vol. 4A (Repl. 1977).

Involved here is the question of the extent of permissible interruption a citizen must bear to accommodate a law enforcement officer who is investigating a crime. The practical necessities of law enforcement and the obvious fact that any person in society may approach any other person for purposes of requesting information make it clear the police have the authority to approach civilians.

There is nothing in the Constitution which prevents the police from addressing questions to any individual. *See Terry v. Ohio, supra.* However, the approach of a citizen pursuant to a policeman's investigative law enforcement function must be reasonable under the existent circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and personal freedom. To be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter. *People v. De Bour,* 40 N.Y. 2d 210, 352 N.E.2d 562 (1976).

Rule 2.2, Ark. Rules Crim. Proc., Ark. Stat. Ann., Vol.

4A (Repl. 1977) is a codification and accommodate of these interests:

> Rule 2.2 Authority to Request Cooperation.
>
> (a) A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

We pointed out in *Meadows v. State,* 269 Ark. 380, 602 S.W. 2d 636 (1981) that this Rule could be used in investigating crime, although it was found inapplicable to the facts in that case because the officers detained persons who were suspected of engaging in criminal activities.

The circumstances of this case bring us to the conclusion that this stop was reasonable. The scene of the crime was located approximately a quarter of a mile from Kanis Park. The robbers were last seen leaving the rear door of the jewelry store which placed them in a wooded area adjoining Kanis Park. The time sequence was such that a person in Kanis Park about the time that appellant was stopped likely would have seen the robbers — there being no one else in the park on this rainy afternoon. The intrusion into appellant's right of privacy and freedom of movement was minimal as compared to the governmental interest in investigating a very serious class "A" felony offense. The manner and intensity of the interference was slight and significantly casual. The officer stated that he only wanted to ask appellant if he had seen anyone in the park. The initial encounter was not an aggressive one as

evidenced by the fact that the officer allowed appellant to walk back to his police car immediately after stopping him.

The circumstances leading up to the arrest were sufficient to establish probable cause for the arrest — muddy tennis shoes, wet jeans, shaking hands, and appellant's statement that two other persons (who were not visible) were in the car. Having made a lawful custodial arrest of the occupants of the automobile, the officer was justified, as a contemporaneous incident of that arrest, in searching the passenger compartment of the car. The police may also examine the contents of any containers found within the passenger compartment; the container may be searched whether open or closed since the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have in the containers. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a limited search incident to the arrest requires no additional justification. *New York v. Belton, supra.*

Affirmed.

PURTLE, J., dissents.

SUPREME COURT OF ARKANSAS

No. CR 81-101

LARRY D. BAXTER ..... *Appellant*

v.

STATE OF ARKANSAS ..... *Appellee*

Opinion Delivered January 18, 1982

DISSENTING OPINION

JOHN I. PURTLE, *Associate Justice*

I respectfully dissent because the majority has denied appellant his rights as guaranteed by the Fourth Amendment to the United States Constitution. I feel, first, that the stop and arrest of the appellant should have been held to be illegal and second, that the search and seizure of appellant's automobile was not done within constitutional bounds. I would like to address myself to these points individually.

THE STOP AND ARREST

Officer Porterfield received a radio broadcast at 4:05 p.m. on the day of the robbery, which included a description of two suspects. No car was mentioned in the broadcast. On a hunch, he went directly to Kanis Park, met a vehicle, turned, overtook it, flipped on his blue lights, and pulled over appellant who was driving a bright orange Vega. Officer Porterfield testified that appellant was not breaking any laws or acting unusual in any way and did not fit the description of the robbers. As a matter of fact, the observed vehicle had an opportunity to turn away from the police car at an intersection, but the car passed directly by the police car and the police officer and appellant made

eye contact with one another. The officer was not the least bit suspicious of appellant at this time. Nevertheless, Officer Porterfield turned around, switched on his blue lights, gave chase and pulled the vehicle over. The officer's explanation was that the driver might be a possible witness to a robbery which had taken place perhaps an hour before (3:15 p.m. according to one witness) and at a place a quarter mile away.

Ark. Stat. Ann. §43-432 (Repl. 1977), deals directly with the stopping of witnesses to a felony, the pertinent part of which reads:

> Whenever a law enforcement officer has reasonable cause to believe that any person found at or near the scene of a felony is a material witness to the felony, he may stop that person and after having identified himself he must advise the person of the purpose of the stopping and may then demand of him his name, address, and any information he may have regarding the felony. . . .

Based on review of the record, I can find nothing to substantiate the majority's expressed opinion that the stop was based on reasonable suspicion. To the contra, the officer was not even remotely suspicious that appellant was a suspect nor was there evidence that he suspected appellant was a material witness. The stop violated the appellant's Fourth Amendment rights against unreasonable searches and seizures and unreasonably infringed on his right as a motorist to be free from arbitrary disruption or unrestricted lawful travel. When a police officer accosts an individual and by show of authority restrains his liberty short of arrest, the stop becomes a "seizure" of the person. Such a seizure must then be tested for reasonable-

ness under the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1 (1968). Arkansas Rules of Criminal Procedure, Rule 2.1, defines reasonable suspicion:

> "Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

Our statutes have also set limitations on the right of a police officer to stop and search. Ark. Stat. Ann. §43-434 (Repl. 1977) states in part:

> This Act (§§43-429 — 43-436) shall not be construed to:
>
> (1) Permit an officer to stop any passerby . . .
>
> (2) Permit the stopping and searching of any person found in the vicinity of a felony scene, merely because he happens to be there.

There is no doubt in my mind that Officer Porterfield's blue-light chase and pull-over of the first vehicle he observed in Kanis Park upon the pretense that the occupant (who did not fit the description of either robbery suspect) was somehow a witness to a crime committed almost an hour before and a quarter mile away was nothing short of an unreasonable and patently violative intrusion of appellant's Fourth Amendment rights. There were other less intrusive means readily available to Officer Porterfield if he had indeed been concerned with obtaining information

from the appellant. In *United States v. Ward*, 488 F.2d 162 (9th Cir. 1973), the court stated:

> Clearly, the narrow exception of *Terry v. Ohio*, supra, which allows investigative stops on grounds short of probable cause cannot be stretched so far as to allow detentive stops for generalized criminal inquiries.

The court there held that where less intrusive means were available, it then followed that "there were no exigent circumstances warranting the extreme nature of a vehicular stop by a siren on a public street."

As far as the subsequent arrest is concerned, not only would it be illegal as the product of an illegal stop, but also, even standing alone, Officer Porterfield lacked the necessary probable cause to effect it. Officer Porterfield cited three factors for his justification of arresting the appellant: (1) that appellant was wearing tennis shoes, (2) that his pants legs appeared to be ". . . a little bit wet," and, (3) that his hands shook when he produced his driver's license. However, he knew none of these things until after he stopped appellant and, as a matter of fact, did not even mention shoes or wet pants in his police report.

Although the officer admitted that the appellant did not meet the description of the robbers, except for the fact he was wearing tennis shoes, he did not dismiss him. When appellant stated to the officer that there were two other persons in the car, Officer Porterfield pulled his pistol and kept the appellant covered while he approached the Vega.

I cannot allow the majority to say in effect that "the end justifies the means" as seems to be the case here. Even though Officer Porterfield's hunch turned out to be fruit-

ful, it cannot be said that either the stop or the arrest was based on probable cause. The reason we have set standards is in order that people may be secure in knowing what their rights are. An intrusion on anyone's rights in this regard is a diminution of everyone's rights. The majority opinion will allow almost any stop and subsequent arrest on the basis that the officer was merely investigating.

Admittedly, the stop was not made pursuant to the officer's founded suspicion that appellant was involved in criminal behavior, rather, it was made to question appellant about third parties and any information he might have had about them in connection with the crime. Once he had made inquiry as to this he should have dismissed appellant. Yet, the officer has made a feeble attempt to justify his subsequent arrest on the basis of a shaking hand, damp pants legs and tennis shoes, all of which certainly do not constitute probable cause. Having found that Officer Porterfield's stop of appellant's car is an unreasonable intrusion under the Fourth Amendment it should be held that any and all materials discovered as a result of that stop should have been suppressed as the fruit of an unlawful stop. *Wong Sun v. United States,* 371 U.S. 471 (1963).

THE SEARCH AND SEIZURE

As to the search and seizure of the back compartment of the automobile, I believe the majority's reliance on *New York v. Belton,* —— U.S. ——, 69 L.Ed. 2d 768 (1981), to be totally without basis. The United States Supreme Court's landmark decision in *Belton* specifically states:

> . . . we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of

> that arrest, search the passenger compartment of that automobile.

Firstly, this was not a lawful custodial arrest, as I have pointed out in the first part of this dissent; and secondly, the hatchback portion of a Vega hatchback automobile can in no wise be considered as part of the "passenger compartment." I see no way passengers could possibly fit into the luggage compartment of a hatchback automobile. One of the officers even testified that he had to take the car keys and open the hatchback (he called it a "trunk") to get the pillowcases.

Under our decision in *Moore v. State,* 268 Ark. 171, 594 S.W.2d 245 (1980), coupled with the United States Supreme Court's decision in *New York v. Belton,* supra, there are three exceptions involved in a warrantless search of an automobile: (1) cases involving danger to the officers; (2) cases involving loss or destruction of evidence; and, (3) searches of the passenger compartment when such search is incident to a lawful arrest. The present case contains none of the above-mentioned criteria. Therefore, the fruits should be considered inadmissible under *Wong Sun v. United States,* supra. The officers had the automobile under their exclusive control, they had the appellant and two other passengers under arrest and conceivably they had the right to search the passenger compartment. But to search the hatchback portion, they would have had to submit their probable cause to an impartial magistrate for a determination and issuance of a warrant. To do otherwise would not comport with the clear provisions of the Fourth Amendment to the United States Constitution.

There are two other facets of this case which trouble me. The initial police radio broadcast mentioned that one of the robbers was wearing black boots. In what I perceive to be an after the fact attempt to establish probable cause, at a preliminary hearing in the case, one officer testified he observed a pair of black boots sitting in the front floorboard of the vehicle. Another officer testified he saw the boots in the storage compartment of the hatchback vehicle, and a third officer testified he took the boots off of one of the other codefendants at the police station. It was stipulated that there was only one pair of boots involved. The second point is the refusal to grant appellant's request to have the codefendants' trial before his in order that they might be free to testify and corroborate his story that he had merely come to the park in response to their telephone call for the sole purpose of picking them up and transporting them to their home.

APPENDIX "C"

Office of The Clerk

SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS

Little Rock

February 16, 1982

Mart Vehik
Attorney at Law
P.O. Box 1470
Little Rock, AR 72203

Re: CR81-101 Larry D. Baxter v. State of Arkansas

Dear Mr. Vehik:

The Court made the following order in the above styled case today:

> "Petition for Rehearing is denied. Purtle, J., would grant."

Sincerely yours,

/s/ Dona L. Williams, Clerk

DLW:rh

cc: Theodore Holder
Jacque Alexander